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PHILIP S. JOHNSON			ORWIG, KEVIN S	
JOHNSON & JOHNSON				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No. 10/541,950	Applicant(s) HAUSER ET AL.
	Examiner Kevin S. Orwig	Art Unit 1611

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 20 November 2009.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-15, 24 and 26 is/are pending in the application.

4a) Of the above claim(s) 6, 24 and 26 is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-5 and 7-15 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some * c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statements (PTO/SB/06)
Paper No(s)/Mail Date 7/8/05, 12/17/08

4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____

5) Notice of Informal Patent Application

6) Other: Exhibit A (Translation of WO0054733)

DETAILED ACTION

Status of the Claims

Claims 1-15 are currently pending. Claims 1-5 and 7-15 are the subject of this Office Action. This is the first Office Action on the merits of the claims. Non-elected claim 6 is withdrawn from consideration.

Election/Restrictions

Applicants' election of Group I (claims 1-15) in the reply filed on Aug. 5, 2009 is acknowledged. Applicants have elected Group I without traverse. Claims 24 and 26 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim.

In the response of Nov. 20, 2009, applicants elected the following species:

Wax phase component: dialkyl(ene) ethers

Claim 6 is withdrawn from consideration since it does not encompass the elected species. No ether components are recited in claim 6 (diglycerides, for example comprise ester, not ether, linkages). Thus, claim 6 is withdrawn as directed to a non-elected species.

Information Disclosure Statement

References lined-through on the information disclosure statement(s) were not considered because they were not provided or were not provided in English. The reference to Mason *et al.* (listed as A1 on the IDS of 7/8/10) was not considered because the document corresponding to U.S. 2003/0041772 is clearly not relevant to the current application, and thus appears to be in error.

Specification

It is noted that this application appears to claim subject matter disclosed in prior Application No. PCT/EP04/00981, filed 1/8/204. A reference to the prior application must be inserted as the first sentence(s) of the specification of this application or in an application data sheet (37 CFR 1.76), if applicant intends to rely on the filing date of the prior application under 35 U.S.C. 119(e), 120, 121, or 365(e). See 37 CFR 1.78(a). For benefit claims under 35 U.S.C. 120, 121, or 365(e), the reference must include the relationship (i.e., continuation, divisional, or continuation-in-part) of all nonprovisional applications. If the application is a utility or plant application filed under 35 U.S.C. 111(a) on or after November 29, 2000, the specific reference to the prior application must be submitted during the pendency of the application and within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior application. If the application is a utility or plant application which entered the national stage from an international application filed on or after November 29, 2000, after compliance with 35 U.S.C. 371, the specific reference must be submitted during the pendency of the application and within the later of four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) or sixteen months from the filing date of the prior application. See 37 CFR 1.78(a)(2)(ii) and (a)(5)(ii). This time period is not

extendable and a failure to submit the reference required by 35 U.S.C. 119(e) and/or 120, where applicable, within this time period is considered a waiver of any benefit of such prior application(s) under 35 U.S.C. 119(e), 120, 121 and 365(c). A benefit claim filed after the required time period may be accepted if it is accompanied by a grantable petition to accept an unintentionally delayed benefit claim under 35 U.S.C. 119(e), 120, 121 and 365(c). The petition must be accompanied by (1) the reference required by 35 U.S.C. 120 or 119(e) and 37 CFR 1.78(a)(2) or (a)(5) to the prior application (unless previously submitted), (2) a surcharge under 37 CFR 1.17(t), and (3) a statement that the entire delay between the date the claim was due under 37 CFR 1.78(a)(2) or (a)(5) and the date the claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional. The petition should be addressed to: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450.

If the reference to the prior application was previously submitted within the time period set forth in 37 CFR 1.78(a), but not in the first sentence(s) of the specification or an application data sheet (ADS) as required by 37 CFR 1.78(a) (e.g., if the reference was submitted in an oath or declaration or the application transmittal letter), and the information concerning the benefit claim was recognized by the Office as shown by its inclusion on the first filing receipt, the petition under 37 CFR 1.78(a) and the surcharge under 37 CFR 1.17(t) are not required. Applicant is still required to submit the reference in compliance with 37 CFR 1.78(a) by filing an amendment to the first sentence(s) of the specification or an ADS. See MPEP § 201.11.

Claim Objections

Claims 12 and 13 are objected to because of the following informalities: there should be a space between the terms "claim 1" and "wherein". Appropriate correction is required.

Claim Rejections - 35 USC § 112 (2nd Paragraph)

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 2-4 and 15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 2-4 and 15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 2, 3, and 4 are indefinite in the recitations "suitable wax components" in claim 2 and "suitable emulsifier" in claim 4. The term "suitable" is a relative term which renders the claims indefinite. The term is subjective and is not defined in a limiting way in the specification. Moreover, the properties or criteria by which a wax component or emulsifier must be judged "suitable" are not described in the specification, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. Thus, one of ordinary skill in the art could reasonably construe "suitable" to mean any subjective measure. Since one of ordinary skill in the art could not be expected to make a reasonable distinction in the absence of further definitions and/or guidance in the specification, the metes and bounds of these claims are indefinite.

Moreover, claim 2 recites "ambient temperature". The discussion of the term "ambient temperature" in paragraph [0101] of the pre-grant publication is noted. However, paragraph [0101] states that "ambient temperature" refers to a temperature that is in the range of about 20°C to about 25°C. This is not a proper limiting definition inasmuch as it encompasses values lower than 20°C and higher than 25°C. Thus, "ambient temperature" can reasonably be construed as any value depending on ambient conditions. Furthermore, claim 2 also recites that the temperature can be equal to or higher than 25°C. Given the uncertainty of the range of about 20°C to about 25°C, this claim could also be construed as containing a broad and narrow range in the same claim because the indefinite range encompasses about 25°C. A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Claim 2 recites the broad range (equal or higher than 25°C and also recite more narrow ranges (about 25 °C).

Claim 15, which depends from claim 1, recites an *additional* aqueous phase be applied to the sheet. This limitation is unclear as no aqueous phase is recited or required in claim 1. For the purposes of the rejections herein, this claim is interpreted as depending from claim 2, which recites an aqueous phase.

Claim 15 is further indefinite in the recitation "...applied to the sheet" (emphasis added). Specifically, claim 1 excludes sheet structures. Thus, it is unclear how the aqueous phase could be applied to the sheet, which is excluded from the claim.

Priority

Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-5 and 8 are rejected under 35 U.S.C. 102(b) as being anticipated by Förster (WO 00/54733; Published Sep. 21, 2000).

1. WO 00/54733 is in German, therefore an English translation is provided. Page and paragraph numbers refer to the translation. Förster discloses absorbent carriers containing nanoparticle dispersions (title; abstract). The object of Förster's invention is to provide absorbent carriers, such as tampons, which contain active agents that are solid at 40°C (p. 3, 2nd par.; p. 10, 1st par.). Förster teaches that waxes and lipids with melting points of 40-90°C can be converted to finely divided dispersions, preferably in water, in the presence of an emulsifier (p. 7, 4th par.; p. 9, 2nd par.), and defines waxes as substances that are solid at 20°C (p. 5, 4th par.). Förster teaches that the dispersions have average particle sizes of less than 500 nm or less than 300 nm (p. 7, 4th par.; p. 9, 1st par.; Examples 1-4; claim 6). Förster teaches that the nanoparticles of the dispersion (i.e. the wax phase) are present in amounts of up to 10 wt% (p. 9, 3rd par.). Förster reads on claims 1-5 and 8.

Claims 1 and 2 are rejected under 35 U.S.C. 102(b) as being anticipated by LICHSTEIN (EP 0692263; Published Jan. 17, 1996).

2. Lichstein discloses lubricated wax coated articles (title; abstract). Lichstein teaches applying the dispersed waxy substance as aqueous dispersions to various absorbent articles, such as tampons (abstract; p. 3, lines 9-23). The waxy substance is intended to be a solid under normal conditions, even in contact with the body, and have softening points above body temperature (i.e. melting points above 25 °C) (p. 3, lines 11-12).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any

evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Förster.

3. The teachings of Förster are presented *supra*. Förster teaches that the nanoparticles of the dispersion (i.e. the wax phase) are present in amounts of up to 10 wt% (p. 9, 3rd par.). Thus, it would have been *prima facie* obvious to use amounts in this range per Förster's teachings, rendering claim 12 obvious.

Claims 1, 13, and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Förster in view of BURGARD (WO 96/34829, Published Nov. 7, 1996) as evidenced by U.S. 5,935,275.

4. WO 96/34829 is in German, therefore U.S. 5,935,275 the result of the national stage entry of the international application is relied upon herein as an English equivalent. Column and line numbers refer to U.S. 5,935,275. The teachings of Förster are presented *supra*. Förster teaches that methods for producing nanoscale suspensions in the presence of surface-blocking agents or polymers are known (p. 8, 3rd full par.). Förster specifically references WO 96/34829 (Burgard) when referring to such methods, and states that the compounds used by Burgard are suitable for the disclosed compositions as well (p. 8, 4th full par.). Thus, it would have been *prima facie* obvious for an artisan to use any of the polymeric surface blocking agents taught by Burgard (see col. 4, line 56 to col. 5, line 14) in Förster's compositions with a high expectation of

success. Burgard teaches the use of these substances in amounts of 2-30% by weight (col. 5, lines 31-36). Claims 13 and 14 are obvious over Förster and Burgard.

Claims 1, 5, 7, 9-11 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Förster in view of MARTENS (U.S. 2005/0031847; Filed Jul. 12, 2002).

5. The teachings of Förster are presented *supra*. Förster does not limit the substances useable as waxes in the dispersions as long as the substances are solid and kneadable at 20°C and melt above about 40°C. Thus, one would have been motivated to look to the art for guidance.

6. Martens discloses products that comprise a sheet of absorbent material to which a lipid phase and an aqueous phase have been applied (title; abstract). Martens teaches that dialkyl(ene) ethers (elected species), particularly distearyl ethers, are useful as the wax component (pars. [0092], [0095], [0114]-[0119]). Martens teaches that the addition of dialkyl(ene) ethers in an amount of 1-30% allows optimization of the wax phase properties, such as skin feel (pars. [0117] and [0130]). Martens teaches the use of non-ionic emulsifiers such as alkyl oligoglycosides as particularly skin-compatible preferred emulsifiers in an amount of 0.1-10% (pars. [0186], [0234], [0336], and [0348]). Martens teaches the use oil components, such as hydrogenated (i.e. hardened) castor oil in an amount of 1-10% to advantageously increase the constituency of the wax phase (pars. [0065], [0066], [0164], [0185]; claim 7). Martens teaches that the wax phase may further comprise triglycerides such as glyceryl tristearate in amounts of 5-90% (pars. [0067]-[0069] and [0187]). In particular, see the composition of the preferred embodiment for the *lipid phase* presented in pars. [0181]-[0188].

7. In light of these teachings, it would have been *prima facie* obvious to one of ordinary skill in the art at the time of the invention to prepare the wax dispersions of Förster with the

preferred components taught in the prior art, to provide a storage stable emulsion with good skin-feel and moisturizing properties.

8. Martens also teaches that various combinations of waxy and aqueous phases, including subsequent aqueous phases following the application of a waxy phase, can be applied to the sheet to produce various color combinations (par. [0219]). In light of these teachings, it would have been *prima facie* obvious to one of ordinary skill in the art at the time of the invention to prepare the wax dispersions of Förster and to apply a subsequent aqueous phase to color the product in a particular fashion.

Claims 1-5, 7-11, and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Förster in view of ANSMANN (WO 03/005981; Published Jan. 23, 2003) as evidenced by U.S. 2004/0234561.

9. WO 03/005981 is in German, therefore U.S. 2004/0234561, the result of the national stage entry of the international application, is relied upon herein as an English equivalent. Paragraph numbers refer to U.S. 2004/0234561. The teachings of Förster are presented *supra*. Förster does not limit the substances useable as waxes in the dispersions as long as the substances are solid and kneadable at 20°C and melt above about 40°C. Thus, one would have been motivated to look to the art for guidance.

10. Ansmann discloses wax compositions for use on personal hygiene articles (title; abstract). The compositions have good dermatological compatibility, are readily processable (par. [0006]). Further, the compositions have melting points above 25°C, and preferably comprise dialkyl(ene)ethers (including C₁₄-C₃₀ dialkyl ethers) (most preferably used in amounts of 1-10%), oils (preferably 1-15%), waxy lipids (preferably 5-65%), and emulsifiers with

advantageous dermatological compatibility (abstract; pars. [0009], [0013], [0015], [0019], [0022]-[0024], [0026]-[0029], and [0038]-[0040]). Ansmann teaches that distearyl ether is most particularly suitable (par. [0015]). Nonionic emulsifiers are preferred, and are taught in quantities of up to 20% (par. [0060]). Ansmann also teaches the use of polymers including polyacrylates (pars. [0093]-[0098]). Ansmann teaches after-treatment of the articles with aqueous compositions (pars. [0006], [0012], and [0013])

11. In light of these teachings, it would have been *prima facie* obvious to one of ordinary skill in the art at the time of the invention to use Ansmann's compositions as the waxy phase of Förster's dispersions. One would have been motivated to do so since the references are drawn to similar problems in the art. Further, the artisan would have had the expectation of providing articles with improved skin-feel and compositions having improved processability as taught by Ansmann. Claims 1-5, 7-11, and 15 are obvious over Förster and Ansmann

Regarding the obviousness rejections above, it is noted that a reference is good not only for what it teaches by direct anticipation but also for what one of ordinary skill in the art might reasonably infer from the teachings. (*In re Opprecht* 12 USPQ 2d 1235, 1236 (Fed Cir. 1989); *In re Bode* 193 USPQ 12 (CCPA) 1976). In light of the forgoing discussion, the examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a). From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, in the absence of evidence to the contrary, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

U.S. Patent Application No. 10/483,616

Claims 1-5 and 7-15 and are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 23-26, and 28 of copending Application No. 10/483,616 in view of Förster and Ansmann. Although the conflicting claims are not identical, they are not patentably distinct from each other because the scope of the '616 claims renders obvious that of the instant claims. The difference between the two claim sets is that the instant claims recite a dispersion whereas the '616 claims recite all the components of a dispersion. However, applying the lipid and aqueous phase of the '616 claims together as a dispersion is an obvious variant since the artisan would recognize the convenience of doing so and would be motivated to apply both phases together (i.e. a dispersion) to simplify

the manufacturing process. Moreover, Förster teaches wax dispersions, as well as their application to non-sheet products. '616 claim 24 recites an emulsifier, and '616 claim 25 recites a polymer. Ansmann teaches the amounts of these components as discussed above. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1-5 and 7-15 are directed to an invention not patentably distinct from claims 1, 23-26 and 28 of commonly assigned copending Application No. 10/483,616. Specifically, see above.

The U.S. Patent and Trademark Office normally will not institute an interference between applications or a patent and an application of common ownership (see MPEP Chapter 2300). Commonly assigned copending Application No. 10/483,616, discussed above, would form the basis for a rejection of the noted claims under 35 U.S.C. 103(a) if the commonly assigned case qualifies as prior art under 35 U.S.C. 102(e), (f) or (g) and the conflicting inventions were not commonly owned at the time the invention in this application was made. In order for the examiner to resolve this issue, the assignee can, under 35 U.S.C. 103(c) and 37 CFR 1.78(c), either show that the conflicting inventions were commonly owned at the time the invention in this application was made, or name the prior inventor of the conflicting subject matter.

A showing that the inventions were commonly owned at the time the invention in this application was made will preclude a rejection under 35 U.S.C. 103(a) based upon the commonly assigned case as a reference under 35 U.S.C. 102(f) or (g), or 35 U.S.C. 102(e) for applications pending on or after December 10, 2004.

Claims 1-5 and 7-15 and are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 9, 11-13, 15-16, and 23-25 of copending Application No. 10/483,633 in view of Förster and Ansmann. Although the conflicting claims are not identical, they are not patentably distinct from each other because the scope of the '633 claims renders obvious that of the instant claims. The difference between the two claim sets is that the instant claims recite a dispersion whereas the '633 claims recite all the components of a dispersion. However, applying the lipid and aqueous phase of the '633 claims together as a dispersion is an obvious variant since the artisan would recognize the convenience of doing so and would be motivated to apply both phases together (i.e. a dispersion) to simplify the manufacturing process. Moreover, Förster teaches wax dispersions, as well as their application to non-sheet products. '633 claim 24 recites an emulsifier, and '633 claim 25 recites a polymer. Ansmann teaches the amounts of these components as discussed above. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1-5, 7-11 and 13-15 are directed to an invention not patentably distinct from claims 1, 9, 11-13, 15-16, and 23-25 of commonly assigned copending Application No. 10/483,633. Specifically, see above.

The U.S. Patent and Trademark Office normally will not institute an interference between applications or a patent and an application of common ownership (see MPEP Chapter 2300). Commonly assigned copending Application No. 10/483,633, discussed above, would form the basis for a rejection of the noted claims under 35 U.S.C. 103(a) if the commonly assigned case qualifies as prior art under 35 U.S.C. 102(e), (f) or (g) and the conflicting inventions were not

commonly owned at the time the invention in this application was made. In order for the examiner to resolve this issue, the assignee can, under 35 U.S.C. 103(c) and 37 CFR 1.78(c), either show that the conflicting inventions were commonly owned at the time the invention in this application was made, or name the prior inventor of the conflicting subject matter.

A showing that the inventions were commonly owned at the time the invention in this application was made will preclude a rejection under 35 U.S.C. 103(a) based upon the commonly assigned case as a reference under 35 U.S.C. 102(f) or (g), or 35 U.S.C. 102(e) for applications pending on or after December 10, 2004.

U.S. Patent Application No. 10/520,952

Claims 1-5, and 7-15 and are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 3, 6, 7, 10-12, 14-16, and 23-28 of copending Application No. 10/520,952 in view of Förster and Ansmann. Although the conflicting claims are not identical, they are not patentably distinct from each other because the scope of the '952 claims renders obvious that of the instant claims. The difference between the two claim sets is that the instant claims recite a dispersion whereas the '952 claims recite all the components of a dispersion. However, applying the lipid and aqueous phase of the '952 claims together as a dispersion is an obvious variant since the artisan would recognize the convenience of doing so and would be motivated to apply both phases together (i.e. a dispersion) to simplify the manufacturing process. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1-5, and 7-15 are directed to an invention not patentably distinct from claims 1, 3, 6, 7, 10-12, 14-16, and 23-28 of commonly assigned copending Application No. 10/520,952. Specifically, see above.

The U.S. Patent and Trademark Office normally will not institute an interference between applications or a patent and an application of common ownership (see MPEP Chapter 2300). Commonly assigned copending Application No. 10/520,952, discussed above, would form the basis for a rejection of the noted claims under 35 U.S.C. 103(a) if the commonly assigned case qualifies as prior art under 35 U.S.C. 102(e), (f) or (g) and the conflicting inventions were not commonly owned at the time the invention in this application was made. In order for the examiner to resolve this issue, the assignee can, under 35 U.S.C. 103(c) and 37 CFR 1.78(c), either show that the conflicting inventions were commonly owned at the time the invention in this application was made, or name the prior inventor of the conflicting subject matter.

A showing that the inventions were commonly owned at the time the invention in this application was made will preclude a rejection under 35 U.S.C. 103(a) based upon the commonly assigned case as a reference under 35 U.S.C. 102(f) or (g), or 35 U.S.C. 102(e) for applications pending on or after December 10, 2004.

Conclusion

Claims 1-5 and 7-15 are rejected. No claims are currently allowable.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kevin S. Orwig whose telephone number is (571)270-5869. The examiner can normally be reached Monday-Friday 7:00 am-4:00 pm (with alternate Fridays off). If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sharmila Landau can be reached Monday-Friday 8:00 am-5:00 pm at (571)272-0614. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

KSO

/David J Blanchard/
Primary Examiner, Art Unit 1643